

RK PICTURE PERFECT PAINTING,)	No. 62766-0-I
Inc., a Washington corporation,)	
)	
Respondent,)	
)	
v.)	
)	
JOHNSON DESIGN HOMES CORP.,)	
a Washington corporation; JOHNSON)	UNPUBLISHED OPINION
CHEN and JANE DOE CHEN, a)	
marital community,)	FILED: September 28, 2009
)	
Appellant.)	
)	

Johnson Design Homes Corp., a general contractor, built a house in Newcastle, Washington. In September 2006, Johnson hired RK Picture Perfect Painting, Inc., to

paint the interior of the house for \$34,000, including labor and materials. The parties' contract states, "Any other work to be done not listed above will be at the rate of \$50.00 an hour per man. Note: No touch up at this price."¹ RK performed work through February 2007 and Johnson made payments on the contract. RK presented Johnson with a final invoice of \$12,437.50, which included charges for additional touch up work performed between February 21 and March 5. Johnson disputed the additional amounts charged for touch up work and refused to pay. The gravamen of the dispute appears to be whose obligation it was to correct "misting" of paint resulting from overspray where the protective covering had been placed by RK but removed by Johnson to accommodate other contractors, the misting occurred on the second floor from painting the first floor, and RK knew the upstairs covering had been removed.

In August 2007, RK filed a complaint for breach of contract seeking \$12,437.50 in damages as well as attorney fees and costs. Johnson answered and counterclaimed for breach of contract, alleging RK failed to perform its work properly and allowed an excessive amount of overspray or misting to damage the house, in particular, the tiles in the second floor bathroom. Johnson claimed the so-called touch up work was actually work RK performed to correct damage it caused. Johnson sought \$21,900 in damages, plus attorney fees and costs.

The parties submitted their dispute to mandatory arbitration. The arbitrator awarded RK \$12,437.50 and denied Johnson's counterclaim. Johnson moved for a trial de novo. The trial court entered findings of fact and conclusions of law, awarded damages to RK, and dismissed Johnson's counterclaim. On November 24, 2008, the

¹ Exhibit 3 at 2.

court entered judgment for RK for \$12,437.50 plus costs of \$665.90. Johnson filed a timely appeal in December. On January 30, 2009, the court entered a total judgment of \$29,138.57, including damages, costs, and attorney fees.

Johnson appeals, arguing that the court applied the wrong standard for measuring damages in denying Johnson the costs to remedy defects; erroneously awarded damages to RK for time spent unsuccessfully attempting to correct its own defective work; and erroneously awarded attorney fees to RK.

An appellant must separately assign error to each challenged finding of fact.² Unchallenged findings are verities on appeal.³

The court found both that Johnson did not carry its burden of proving “that the ‘misting’ caused significant and non-repairable discoloration of the tiles on the second floor bathroom floors,” and that Johnson directed RK to perform the touch up work.⁴ Johnson has not assigned error to any findings.

Johnson nonetheless argues that certain portions of the findings are irrelevant or arbitrary and demonstrate the trial court’s erroneous legal analysis regarding the proper measure of damages for its counterclaim. Contrary to Johnson’s claim, it is clear from the record that the court denied the counterclaim because Johnson failed to prove any breach or damage caused by RK.

Next, Johnson contends the court erroneously awarded compensation to RK for time spent correcting its own defects. Johnson’s reliance on Crest Inc. v. Costco

² RAP 10.3(g).

³ Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

⁴ Clerk’s Papers at 43–44.

Wholesale Corp.⁵ is misplaced. In Crest, the subcontractor conceded that it deviated from the contract specifications and was therefore responsible for repairing or replacing its work.⁶ But here, the court did not find that RK breached the contract. Rather, the court found that the necessity for the cleanup “was not the fault of [RK];” that Johnson directed RK to perform the cleanup work; and that in any event, Johnson failed to prove the misting caused any significant damage.⁷ In light of these unchallenged findings, the court properly concluded RK was entitled to compensation for its work.

Johnson also challenges the court’s award of attorney fees to RK after the appeal was perfected. Johnson argues that the court lacked jurisdiction to enter the award because the question of attorney fees had been briefed and ruled upon in the November 24, 2008 judgment.

Under RAP 7.2(i), the trial court “has authority to act on claims for attorney fees, costs and litigation expenses” after review is accepted. A party may obtain review of a decision on attorney fees in the review proceeding regarding the judgment without filing a separate notice of appeal.⁸

At a hearing on January 30, 2009, the trial court acknowledged deleting language about an attorney fee award from the November 24 judgment. But the court indicated he was then not aware the case involved an appeal from an arbitration award, and indicated he “did not intend to rule on anything concerning eligibility for attorney’s fees” and “had

⁵ 128 Wn. App. 760, 115 P.3d 349 (2005).

⁶ Id. at 766.

⁷ Clerk’s Papers at 43–44.

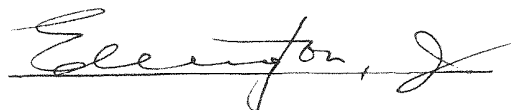
⁸ RAP 7.2(i).

never looked at the arbitrator's award."⁹ Noting that the oversight was inadvertent, the judge signed a new judgment including an award of fees based on Johnson's failure to improve his position on the trial de novo, per MAR 7.3. RK then sought and obtained permission from this court for formal entry of the judgment pursuant to RAP 7.2(e) concerning postjudgment modification of decisions.

Beyond disruption of the appellate process, Johnson does not identify any substantive error in the attorney fee award, and admits that the assignment of error depends upon reversal by this court of some portion of the judgment on the merits. Under these circumstances, Johnson fails to establish grounds for relief.

RK requests attorney fees on appeal under RAP 18.1 and MAR 7.3. Under MAR 7.3, the trial court assesses costs and reasonable attorney fees against a party who appeals the award and fails to improve the party's position on the trial de novo. A party entitled to fees under MAR 7.3 is also entitled to fees on appeal if the appealing party again fails to improve its position.¹⁰ Because Johnson failed to improve its position in this appeal, we award RK its costs and reasonable attorney fees on appeal upon compliance with RAP 18.1.

Affirmed.

A handwritten signature in black ink, appearing to read "E. Keeling", with a horizontal line drawn underneath it.

WE CONCUR:

⁹ Report of Proceedings (Jan. 30, 2009) at 4.

¹⁰ Yoon v. Keeling, 91 Wn. App. 302, 306, 956 P.2d 1116 (1998).

Becker, J.

Cox, J.